No. 15-5040

In The
Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* THE ETHICS BUREAU AT YALE, *ET AL.* IN SUPPORT OF PETITIONER

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CAPITAL CASE

Table of Contents

Page

Table of Authorities iii

Interest of Amici Curiae 1

Summary of Argument 2

Argument 5

I. By serving as prosecutor and then judge in the same case, Chief Justice Castille created a serious risk of actual bias by flouting his obligation to identify and avoid a forbidden conflict 5

A. District Attorney Castille's personal involvement in the prosecution of Mr. Williams rendered him unable to later serve as a judge in Mr. Williams' case 5

B. A fortiori, Chief Justice Castille's judicial involvement in this case created the appearance of impropriety and partiality 10

II. Chief Justice Castille had an affirmative obligation to recuse himself because his former involvement as a prosecutor in Mr. Williams' case rendered him partial 12

III. Chief Justice Castille's partiality and impropriety cannot be "cured" by a multimember panel 17

Conclusion 27

Appendix A:

IDENTITY OF *AMICI CURIAE* 1a

Table of Authorities

Page(s)

Cases

In re Bulger,
710 F.3d 42 (1st Cir. 2013) 10

Caperton v. A.T Massey Coal Co.,
556 U.S. 868 (2009) 2, 5, 13, 17

Gay v. United States,
411 U.S. 974 (1973) 4

General Motors Corp. v. City of New York,
501 F.2d 639 (2d Cir. 1974) 16

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 6

Mistretta v. United States,
488 U.S. 361 (1989) 4, 10

In re Murchison,
349 U.S. 133 (1955) ..... *passim*

Potashnick v. Port City Const. Co.,
609 F.2d 1101 (5th Cir. 1980) 10

Public Utilities Comm'n v. Pollak,
343 U.S. 451 (1952) 6

Tumey v. Ohio,
273 U.S. 510 (1927) 6

United States v. Arnpriester,
37 F.3d 466 (9th Cir. 1994) 10, 17

United States v. Craven,
239 F.3d 91 (1st Cir. 2001).....14, 15

United States v. Jones,
997 F.2d 1475 (D.C. Cir. 1993).....6

United States v. Will,
449 U.S. 200 (1980) 26

Withrow v. Larkin,
421 U.S. 35 (1975) 2, 5

Constitutional Provision

Pa. Const., art. 5, § 10(c).....3

Statute

Pa. Cons. Stat. § 325(e)(1) 21

Rules

Model Code of Judicial Conduct R. 1.0(c) 9

Model Code of Judicial Conduct R. 1.2 11

Model Code of Judicial Conduct R. 2.2 .....6, 10

Model Code of Judicial Conduct R. 2.11 .....13, 25

Model Code of Judicial Conduct R. 2.11(A).....12, 13

Model Code of Judicial Conduct R. 2.11(A)(1) 14

Model Code of Judicial Conduct R. 2.11(A)(6)(a).... 13

Model Code of Judicial Conduct R. 2.11(A)(6)(b).... 13

Model Code of Judicial Conduct R. 2.11(A)(6)(d).... 13

Pa. Code of Judicial Conduct Canons 1-4 3

Pa. R. Prof'l Conduct 1.0(c)..... 9

Pa. R Prof'l Conduct 1.10..... 24

Pa. R. Prof'l Conduct 1.11(a)(2) 16

Pa. R. Prof'l Conduct 1.12(a)..... 16

Pa. R. Prof'l Conduct 5.1(a)..... 9

Sup. Ct. R. 37.3..... 1

Other Authorities

ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 143 (1935)..... 11

ABA Comm. on Prof'l Ethics & Grievances, Informal Op. 433 (1961) 11

ABA Comm. on Prof'l Ethics & Grievances, Informal Op. C-676 (1963)..... 11

ABA Comm'n on Standards of Judicial Admin., *Standards Relating to Appellate Courts* (1977) 18

Leslie W Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000) 3

Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity* 55 Ann. Rev. Psychol. 591 (2004) 23

Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998) 19

Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. Pa. L. Rev. 1665 (2006) 22

Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. Legal Analysis 101 (2011) 21

Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 Vand. L. Rev. 1 (2008) 22

Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 13 Geo. J. Legal Ethics 309 (2001)..... 8

Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W L. Rev. 389 (2002)..... 8

Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257 (2007)..... 3

Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. Personality & Soc. Psychol. 1141 (1986)..... 19

Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480 (1990)..... 20

Raymond McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned*, 56 Ariz. L. Rev. 411 (2014)..... 5

Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 Va. L. Rev. 255 (1975)..... 18

Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Innocence*, 84 B.U. L. Rev. 125 (2004)..... 8

Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 Mo. L. Rev. 999 (2009) 7, 8

David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 200 (6th ed. 2003).....23

Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev. 1575 (2006) 21

Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997) 19

State Adoption of Revised Model Code of Judicial Conuct, Am. B. Ass'n (Nov. 2, 2015) http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. 3

Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71 (2000) 19

Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*.....7

Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453 (1981) 22

Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective to Voluntary Deference to Authorities*, 1 Personality Soc. Psychol. 323 (1997) 23

Interest of *Amici Curiae*

The **Ethics Bureau at Yale**[1] is a clinic at Yale Law School composed of fourteen law students supervised by an experienced practicing lawyer, lecturer, and ethics professor. The Bureau has drafted amicus briefs in matters involving lawyer ethics and judicial conduct, assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility, and provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Additional *amici curiae* are the Louis Stein Center for Law and Ethics, as well as lawyers and scholars whose interests include the conduct of the judiciary and the codes that regulate judicial conduct. Because of the large number of *amici*, the names and brief descriptions of these individuals are attached as an appendix.

Because the impartiality of the judicial process, a fundamental element of judicial ethics, has been placed at issue by the pending matter, *amici* believe they might assist the Court in resolving the important issues presented.

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[1] The views expressed herein are not necessarily those of Yale University or Yale Law School. Pursuant to Rule 37.3 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* have made a monetary contribution to the preparation and submission of this brief.

Summary of Argument

In our system of justice, judges possess and exercise tremendous power. With that power comes the obligation to maintain high standards of professional responsibility. Preserving fair and impartial courts is so fundamental that it is a constitutional guarantee under the Due Process Clause. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). At times "the probability of actual bias on the part of the judge is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This case presents one of those circumstances.

To give definition to this constitutional requirement, the Model Code of Judicial Conduct ("the Code") promulgated by the American Bar Association ("ABA") was adopted, in relevant part, by forty-nine of the fifty state supreme courts as enforceable rules governing the conduct of each

state's judges.[2] In writing the Code, the ABA recognized that the American judicial system is premised upon the "principle that an independent, impartial and competent judiciary will interpret and apply the law that governs our society." Model Code of Judicial Conduct pmbl. (2011). Most importantly, the Code does not suggest mere aspirational guidelines, but instead establishes strict, enforceable standards for the ethical conduct of judges and judicial candidates. *Id.* As such, the Code *requires* judges to make competent decisions in an impartial manner, untainted by personal bias or prejudice.

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[2] Forty-nine of fifty states adopted the 2000 Model Code of Judicial Conduct. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 55 (2000). Thereafter, thirty-two states adopted the 2007 revision of the Code, while fifteen others have established committees to do so. *State Adoption of Revised Model Code of Judicial Conduct*, Am. B. Ass'n (Nov. 2, 2015), http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. Because the 2007 revision did not change the relevant Code provisions at issue in this case—the standards for impropriety, appearance of impropriety, and disqualification—these provisions have been adopted by forty-nine states, regardless of whether some of these states have adopted the 2007 revision in full. *See* Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257 (2007).

Pennsylvania has adopted the 2007 Model Code of Judicial Conduct, which is referenced in this brief. In fact, Chief Justice Castille was a member of the Court that adopted and amended the Code of Judicial Conduct in both 2005 and 2014. *See* Pa. Code of Judical Conduct Canons 1-4 (2014); *see also* Pa. Const. art. 5, § 10(c) ("[T]he Supreme Court shall have the power to prescribe rules governing the conduct of all courts.").

Judges who wear "two hats" in the same case violate the requirement of judicial impartiality. *Mistretta v. United States*, 488 U.S. 361, 404 (1989). It is particularly egregious when a sitting judge continues to wear a prosecutor's hat. *See Gay v. United States*, 411 U.S. 974, 975 (1973) (Douglas, J., dissenting) ("[It is a] basic concept of due process of law that a person should not serve as both prosecutor and judge."). In blatant violation of these principles, then-Chief Justice of the Pennsylvania Supreme Court Ronald Castille refused to recuse himself despite having sought the death penalty in Mr. Terrance Williams' prosecution while serving as District Attorney of Philadelphia. Wearing a prosecutor's hat that was impossible to remove because of his personal stake and role as a lawyer in Mr. Williams' case, Chief Justice Castille impermissibly sat on the bench when his Court reversed Mr. Williams' successful petition for post-conviction relief.

As tempting as it might be, it is a per se violation of the Code for a prosecutor (or any lawyer, for that matter), having secured victory in the trial court and on direct appeal, to then sit as a judge on the court that adjudicates a challenge to that victory. In the view of *amici*, violations of the Code of this magnitude are clear evidence of a Due Process violation. Because there can be no dispute that the Code violations here are among the gravest found in the Code, Chief Justice Castille's conduct deeply undermined the integrity of the judicial proceedings and trampled any notion of Due Process for Mr. Williams.

Argument

I. By serving as prosecutor and then judge in the same case, Chief Justice Castille created a serious risk of actual bias by flouting his obligation to identify and avoid a forbidden conflict.

A. District Attorney Castille's personal involvement in the prosecution of Mr. Williams rendered him unable to later serve as a judge in Mr. Williams' case.

In order to decide their cases fairly and independently, judges are required by both Due Process and the Code to remain impartial and independent. This standard reflects the fundamental right, guaranteed by the Due Process Clause, to present one's case to an impartial tribunal. *Caperton*, 556 U.S. at 876. Based on several prior decisions, *Caperton* mandated an objective standard to guarantee this right—"whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden.'" *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47).

This essential right is clearly endangered when a judge's conscious or unconscious partiality threatens to "infect both the process and outcome of a trial." Raymond McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned*, 56 Ariz. L. Rev. 411, 432 (2014). Indeed,

anything that might tempt a judge to forget the burden of proof required to convict or lead the judge "not to hold the balance nice, clear and true between the State and the accused," denies the accused the Due Process of law *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Chief Justice Castille had every reason to understand these obligations under both the Due Process Clause and the Code, but ignored them when he sat on a tribunal that decided the appeal of a case he began as District Attorney. A fundamental tenet of our adversarial system is the purposeful separation of the prosecutorial and judicial roles. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("[T]he strict requirements of neutrality cannot be the same for prosecutors as for judges, whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."); *United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993) ("There is also a critical difference between the prosecutor's role as an advocate for the government's position and the judge's role as an impartial arbiter and protector of the defendant's rights.").

The ideal judge should be neutral and open-minded, serving as a detached arbiter rather than a forceful advocate for one side in a case. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 466 (1952) (explaining that a judge "must think dispassionately and submerge private feeling on every aspect of a case"); Model Code of Judicial Conduct R. 2.2 cmt. 1 ("To ensure impartiality and fairness to all parties, a judge must be objective and open-minded."). In

contrast, a prosecutor is involved in a case as a vigorous advocate for the government in an adversarial process. It would thus be "difficult if not impossible for such a judge to free himself from the influence of what took place" in his previous role as a prosecutor. *In re Murchison*, 349 U.S. at 138. As a result, a prosecutor-turned-judge cannot be "wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137

Psychological research on cognitive biases explains why a prosecutor cannot later serve as a neutral judge in the same case. When people are rewarded for their success in persuading others of the correctness of a position, they then become psychologically committed to that position and devote the majority of their mental effort to justifying it. *E.g.*, Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. Personality & Soc. Psychol. 632, 633 (1989). This confirmation bias effect, known as defensive bolstering, makes people in such circumstances less likely to acknowledge the weaknesses of their positions and more likely to engage in self-justification. *Id.*

Empirical studies have also found that these inherent cognitive limitations make prosecutors more likely to minimize evidence inconsistent with their favored hypothesis—the defendant's guilt—and to construe ambiguous information in a way that supports this hypothesis. Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in*

Prosecutorial Decision Making, 74 Mo. L. Rev. 999, 1027-32 (2009). A prosecutor publicly stakes out the position that the defendant should be found guilty when he files charges, and the verdict is the only feedback he receives about the correctness of that decision. *Id.* at 1022-23. Due to the nature of the prosecutor's ultimate task of publicly presenting an effective case for the defendant's guilt, a prosecutor-turned-judge would thus have to overcome powerful cognitive limitations to serve as a neutral, impartial judge in the same case in which he previously advocated, before the court and his community, for the correctness of his assessment of the defendant's guilt.[3]

Here, Chief Justice Castille's personal involvement in the prosecution of Mr. Williams compels the conclusion that he was subject to these cognitive limitations. As the District Attorney, he personally authorized the decision to seek the death penalty after he had already assessed the evidence against Mr. Williams and publicly committed himself to Mr. Williams' guilt and to a death

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[3] This bias is likely exacerbated in the context of post-conviction challenges. Scholars have identified institutional and psychological reasons why prosecutors may be unduly skeptical of such challenges; relevant factors include public pressure not to look "soft on crime," fear of offending police or victims by appearing too defense-minded, and the prosecutor's own personal commitment to the conviction. *E.g.*, Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 13 Geo. J. Legal Ethics 309 (2001); Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W L. Rev. 389 (2002); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Innocence*, 84 B.U. L. Rev. 125 (2004).

sentence. Although he was not advocating before the jury in his role as the District Attorney, he was responsible for supervising the trial prosecutor who was found to have violated her *Brady* obligations, and he signed his name on the appellate brief his office filed to defend the death sentence it had obtained in Mr. Williams' case. The psychological effects of cognitive bias and defensive bolstering apply perhaps even more powerfully to the District Attorney, an elected public official who was the face of his office's decision to prosecute and seek the death penalty against Mr. Williams.

Chief Justice Castille's partiality was further compounded because his task was to evaluate the performance of his own law office and the lawyers he supervised in prosecuting Mr. Williams. As District Attorney, he was responsible for overseeing the conduct of trial prosecutors in his office, including their compliance with *Brady* obligations to disclose exculpatory evidence. *Cf.* Pa. Rules of Prof'l Conduct R. 5.1(a) (1987) ("A partner in the law firm,[4] and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.").

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[4] "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Pa. Rules of Prof'l Conduct R. 1.0(c); *see also* Model Rules of Prof'l Conduct R. 1.0(c).

Given his professional investment in this case and his public accountability to the position of the State, the District Attorney could not be impartial and neutral when subsequently reviewing the conviction his office obtained. *See In re Bulger*, 710 F.3d 42, 49 (1st Cir. 2013) (explaining that a reasonable person might question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could remain impartial); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) (holding that a judge who had been the U.S. Attorney, and therefore responsible for the entire office, should have recused himself from deciding a case that was under investigation during his tenure). Chief Justice Castille's decision to hear Mr. Williams' case thus flies in the face of his ethical obligations and the requirements of Due Process for a judge to perform all duties of judicial office "fairly and impartially," Model Code of Judicial Conduct R. 2.2, and to remain "objective and open-minded," *id.* cmt. 1.

B. A fortiori, Chief Justice Castille's judicial involvement in this case created the appearance of impropriety and partiality.

Judicial impartiality is not only crucial to protecting litigants' Due Process rights, but also in maintaining public confidence in the justice system. *Mistretta*, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Indeed, the mere questioning of a court's impartiality "threatens the purity of the judicial process and its

institutions." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). As such, maintaining the appearance of impartiality is as important as impartiality itself. *In re Murchison*, 349 U.S. at 136 ("[J]ustice must satisfy the appearance of justice."). The test under the Code is whether the conduct would create in "reasonable minds" a perception that the judge engaged in conduct that "reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Model Code of Judicial Conduct R. 1.2 cmt. 5. This rigorous standard is necessary because the public cannot respect the legitimacy of the courts if judges do not act as models of independence, integrity, and impartiality.[5]

As such, beyond the clear impropriety of Chief Justice Castille's judicial involvement in this case, there is an appearance of impropriety so manifest as to taint Mr. Williams' subsequent post-conviction proceedings before the Pennsylvania Supreme Court. Specifically, when a judge goes from advocating for one party to donning the black robe in the same case, he not only acts without integrity, but also undercuts the public's perception of judicial neutrality

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[5] The ABA urges judges to take considerable precautions when they take the bench to ensure that the appearance of judicial impartiality is maintained. For example, the ABA opined that judges should not allow their former firms to retain their names, *see* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 143 (1935), should not receive a percentage of a contingency fee for the work they did on a case while employed at a firm, *see* ABA Comm. on Prof'l Ethics & Grievances, Informal Op. C-676 (1963), and should not receive a fee for referring a case to a firm, *see* ABA Comm. on Prof'l Ethics & Grievances, Informal Op. 433 (1961).

The appearance of impropriety will exist anytime a prosecutor subsequently presides over his case's appeal. The impropriety is amplified in this case because of the lower court finding that Mr. Williams sought to defend on appeal—namely, whether the trial prosecutor, who was supervised by District Attorney Castille, improperly withheld exculpatory evidence. As a result, the government's appeal required Chief Justice Castille to adjudicate the propriety of the conduct of an attorney under his own leadership and supervision as District Attorney. No reasonable person could conclude that Chief Justice Castille could impartially evaluate the performance of his own colleague, acting under his leadership, because that evaluation would require—both implicitly and explicitly—a judgment of his own leadership and supervision. Given Chief Justice Castille's clear personal interest in this case, it is difficult to conceive of facts that might cast a greater probability of bias or appearance of impropriety.

II. Chief Justice Castille had an affirmative obligation to recuse himself because his former involvement as a prosecutor in Mr. Williams' case rendered him partial.

A judge is required to disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned." Model Code of Judicial Conduct R. 2.11(A). Under both the Code and Due Process, the standard in determining whether a judge is required to recuse himself is objective, focusing not on whether the judge is actually biased, but on whether the judge's impartiality might be reasonably questioned.

Caperton, 556 U.S. at 872 (noting that the Court has required recusal, where as an objective matter, "the probability of actual bias on the part of the judge is too high to be constitutionally tolerable." (internal citations omitted)); Model Code of Judicial Conduct R. 2.11(A).

Because his prior involvement in the case as a prosecutor rendered him partial, Chief Justice Castille was obligated to disqualify himself from this case. The Code identifies this precise circumstance as requiring disqualification when Rule 2.11 mandates that a judge recuse himself if he "served as a lawyer in the matter in controversy, or was associated with a lawyer in the matter in controversy." Model Code of Judicial Conduct R. 2.11(A)(6)(a). Thus, even if Chief Justice Castille had not played any role in Mr. Williams' prosecution, he would still be barred from hearing this case because of his association with the lawyers who did. Rule 2.11 further mandates that a judge who "served in governmental employment, and in such capacity participated personally or substantially as a lawyer or public official concerning the proceeding" also recuse himself. *Id* at R. 2.11(A)(6)(b). Any one of these circumstances obligates a judge to disqualify himself, and Chief Justice Castille's prior involvement as District Attorney satisfies all three.

Moreover, the Code stipulates that judges cannot sit in review of their own decisions, Model Code of Judicial Conduct R. 2.11(A)(6)(d), and prior involvement as a judge on a case necessarily disqualifies them from making future rulings that could be tainted by their prior knowledge, *see In re*

Murchison, 349 U.S. at 139 (finding a Due Process violation when a judge presided at the contempt hearing of a witness after serving as the "one-man grand jury" out of which the contempt charges arose). It would be anomalous to prohibit a judge from reviewing his or her previous decision while allowing a judge to hear a case that he was personally involved in prosecuting, as Chief Justice Castille did in Mr. Williams' case.

Additionally, due to his personal involvement in Mr. Williams' case at the trial level and on direct appeal, Chief Justice Castille likely had access and was privy to information uncovered during the District Attorney's Office's investigation, including information outside the bounds of what was discoverable and introduced at trial. Judges should not rely upon, or even consider, information received outside the official record because "the reliability of that information may not be tested through the adversary process." *United States v. Craven*, 239 F.3d 91, 103 (1st Cir. 2001). Accordingly, judges are obligated to disqualify themselves in cases where they have "personal knowledge of facts that are in dispute in the proceeding." Model Code of Judicial Conduct R. 2.11(A)(1).

Extrajudicial knowledge is proper grounds for recusal because this type of special insight into the facts of a case, without more, may prevent a judge from impartially weighing the parties' evidence and arguments. *In re Murchison*, 349 U.S. at 136-39 (1955) (holding that a judge who held one-man grand jury proceedings could not subsequently preside over the contempt hearing of a witness in that grand jury

because the judge could not free himself from the influence of personal knowledge of what occurred in the grand jury session); *Craven*, 239 F.3d at 103 (disqualifying a sentencing judge who based his sentence on an improper ex parte communication with a court-appointed expert). It would be "difficult, if not impossible, for a judge, no matter how sincere, to purge that information from her mind." *Id.* Here, of course, Chief Justice Castille's access to information went well beyond an ex parte communication.

The attempts to defend Chief Justice Castille's role in signing the death penalty authorization actually provide a compelling demonstration of the impropriety that required Chief Justice Castille to recuse himself. This Court has been told that Chief Justice Castille's approval for his subordinates to seek the death penalty was an "administrative formality." Resp't Opp'n Br. to the Pet. for Cert. 11 n.6. Let us hope not. The decision to seek the death penalty must be one of the most profound acts a prosecutor can reach. Without this "administrative" act by the District Attorney himself, Mr. Williams would not be fighting for his life. Moreover, Chief Justice Castille himself did not believe such actions were routine or trivial when he emphasized the number of executions he sought as District Attorney, as an important component of his political campaign for Chief Justice.

Furthermore, Chief Justice Castille's authorization to seek capital punishment has been defended because it did not reflect some form of personal animosity toward the defendant.

Appellant's Answer to the Mot. to Recuse, Joint Appendix ["J.A."] at 175a. But this characterization misses the point—personal animosity has nothing to do with the recusal standards at issue in this case. It is more than sufficient that at one time Chief Justice Castille was head of the District Attorney's Office in Philadelphia, that he personally authorized the seeking of the death penalty, and that the conduct of the District Attorney's Office under his tenure was the issue when the appeal from the grant of habeas relief came before the Court. These factors alone are more than sufficient to disable him from sitting on the Court that heard that appeal.

Disqualification is a critical prescription for maintaining impartiality. Rule 1.12(a) of the Pennsylvania Rules of Professional Conduct requires a judge moving from the bench to private practice "not [to] represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge." Pa. Rules Prof'l R. 1.12(a), And when a government lawyer moves to private practice, the lawyer is disqualified from representing a private client in a matter in which he or she had responsibility as a public official. *Id.* R. 1.11(a)(2) (explaining that a former government lawyer "shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee"); *see General Motors Corp. v. City of New York*, 501 F.2d 639, 650-52 (2d Cir. 1974). The same public policy that informs the disqualification of a former government lawyer from representing a private client in the same matter for which he had official responsibility should disqualify

him from sitting as judge in the same matter. *Arnpriester*, 37 F.3d at 467-68.

Thus, Chief Justice Castille's decision not to recuse himself was an affront to the bedrock principle of an impartial judiciary. The Code does not merely list best practices, but instead demands that judges act in a manner that maintains the public trust in the judiciary. *See Caperton*, 556 U.S. at 889 (explaining that the Model Code and state codes of judicial conduct "serve to maintain the integrity of the judiciary and the rule of law"). The Code not only establishes ethical obligations that are binding on judges, but also embodies how judges across the country define and understand judicial impartiality. In adopting the Code's provisions concerning disqualifications, supreme court judges nationwide have agreed that transitioning from prosecutor to judge in the same case is improper and incompatible with judicial impartiality.

Chief Justice Castille had a clear ethical conflict in this case and therefore an obligation to recuse himself in the matter. His failure to do so did not just create an invidious harm to Mr. Williams, but also placed an indelible stain on the legitimacy of the judicial system of Pennsylvania.

III. Chief Justice Castille's partiality and impropriety cannot be "cured" by a multimember panel.

While this Court has never decided whether a multimember panel can "cure" a conflicted judge's participation in any proceeding, let alone one with

such high-stakes, the proper answer must be "no." The nature of the multimember panel compounds the insidious nature of such impropriety for four main reasons. First, when a single conflicted judge is allowed to participate in deliberations, he or she taints the entire panel's impartiality with explicit or implicit advocacy for one side. Accordingly, the conflicted judge's participation in the panel effectively multiplies the impermissible biases and ethical violations.

A panel of judges is not intended to be, and is not in fact, a collection of individuals screened off from communication with one another, each in his or her own silo. Instead, multimember panels handle appeals in a manner that maximizes the benefits of different perspectives, backgrounds, and experiences. *See, e.g.*, Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 Va. L. Rev. 255, 281 (1975). It is thus both the expectation and the reality that the panel of judges will participate together in oral arguments and conferences, engage in dialogue designed to persuade their fellow judges of their respective views, and circulate written opinions in the hopes of convincing others to sign on to a particular position. *See, e.g.*, A.B.A. Comm'n on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.01 cmt., at 9 (1977) ("The basic concept of an appeal is that it submits the questions involved to collective judicial judgment."). In short, the very essence of the multimember tribunal creates countless opportunities for a biased judge to infect his colleagues' perspectives by advocating for his impermissible bias during each stage of deliberation.

The potential for a multimember panel to be tainted by the partiality of a single biased judge is not merely a common sense conclusion, but a proposition supported by extensive psychological literature on group susceptibility to post-deliberation attitudinal shifts. The impact of one member's bias on group decisionmaking can enhance that bias' effect. The phenomenon of group polarization occurs "when an initial tendency of individual group members toward a given direction is enhanced following group discussion." Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85 (2000). As a result, "groups often make more extreme decisions than would the typical or average individual." *Id.* "Group polarization is among the most robust patterns found in deliberating bodies," *id.*, and multiple studies have replicated the phenomenon in various contexts, *see, e.g.*, Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. Personality & Soc. Psychol. 1141 (1986). Furthermore, there is growing evidence from studies on multimember judicial panels that judges are far from immune from this polarization. Sunstein, *supra*, at 103-04 (citing Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998); and Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997)).

Given this phenomenon, it is clear that deliberation does not always produce the golden mean of all its members' attitudes in a way that can cancel out bias. Instead, allowing the entry of bias

multiplies the risk that the panel will make a more extreme decision in the direction of that bias.

Second, when the conflicted judge's potential interests in a proceeding are readily apparent, it is extremely difficult for others on the panel to freely criticize one side without apprehension that to do so will tarnish their relationship with their colleague. In this case, the conduct of the District Attorney's Office under Chief Justice Castille's tenure was the central issue on appeal to the Pennsylvania Supreme Court. Any reasonable observer would conclude that all of the Justices were conflicted because each must have considered, either consciously or subconsciously, how criticizing the District Attorney's Office in their conferences or the circulation of draft opinions would affect their rapport with a colleague with whom they deal every day. Given each judge's duty to decide cases impartially and objectively, based solely on the merits of the arguments introduced by each side, such considerations are clearly impermissible.

Again, these concerns are not simply common sense assumptions, but are propositions backed by an extensive psychological literature on motivated or self-interested reasoning. *See, e.g.*, Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480, 483 (1990) ("[People] search memory for those beliefs and rules that could support their desired conclusion. They may also creatively combine accessed knowledge to construct new beliefs that could logically support the desired conclusion. The objectivity of this justification construction process is illusory because people *do not realize* that

the process is biased by their goals. (emphasis added)). Furthermore, unlike the U.S. Supreme Court Justices, judges in other appeals courts often exhibit dissent aversion partly because "the costs in impaired collegiality from frequent dissenting" may outweigh the benefits. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. Legal Analysis 101, 135 (2011).

Third, Chief Justice Castille's role as the Chief Justice placed him in a prime position to exert his influence through both his administrative power and seniority. Specifically, the Pennsylvania Code states that "the president judge of a court shall [b]e the executive and administrative head of the court, supervise the judicial business of the court, promulgate all administrative rules and regulations, make all judicial assignments, and assign and reassign among the personnel of the court available chambers and other physical facilities." Pa. Cons. Stat. § 325(e)(1). Unlike most judicial decisions, which occur in open court and must be explained by reasons that are available to public scrutiny, the Chief Justice's exercise of administrative duties in large part occurs behind closed doors and is thus less constrained by the obligations of accountability and is shielded from public scrutiny. *Cf.* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev 1575, 1632 (2006) (describing how the Chief Justice's administrative decisions in the U.S. Supreme Court are shielded from the public view).

The additional authority vested in the Chief Justice may serve as an extraneous consideration, either consciously or subconsciously, for the other Justices on the panel. As an initial matter, the Justices may be concerned that ruining their rapport with the Chief Justice will negatively affect many of the day-to-day aspects of their work, including the opinion writing assignments they receive, their chamber space, and their physical facilities. Beyond just the potential for inconvenience and annoyance, however, the Chief Justice's administrative powers may serve as an additional tool for him or her to exert influence over the rest of the Court. *See* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. Pa. L. Rev. 1665, 1667-68 (2006); *see also* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 Vand. L. Rev. 1, 2-4 (2008) (describing a case in which a Chief Judge strategically waited for two of his colleagues to take senior status before circulating a petition, so that they could not participate).

Indeed, the Chief Justice takes the lead in structuring oral arguments and conferences. As such, he or she may effectively frame the entire proceeding in a manner that is advantageous to his or her preferred position by speaking first, setting the agenda, and strategically deciding when a vote will be taken. *Cf.* Cross & Lindquist, *supra*, at 1668-69; *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453, 453 (1981) (discussing how the same option may become more attractive or persuasive if it

is framed in way that is less threatening to its audience). Chief Justice Rehnquist himself explained that "what the conference shapes up like is pretty much what the [C]hief [J]ustice makes it." David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 200 (6th ed. 2003).

Even if the administrative powers of the Chief Justice have no immediate impact, "the very title of 'Chief Justice' may provide an amorphous source of leadership authority. so that a Chief Justice generally has an initial *psychological* advantage over the other Justices in a struggle for influence within the Court." Cross & Lindquist, *supra*, at 1673-74 (emphasis added) (internal quotation marks omitted). Psychological research has demonstrated that individuals often voluntarily defer to authority figures, sometimes even to the detriment of others or themselves.

This basic concept is entrenched in the fields of both social and organizational psychology, and it has been studied extensively for decades. *See, e.g.*, Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity* 55 Ann. Rev. Psychol. 591, 596 (2004) ("Most organizations would cease to operate efficiently if deference to authority were not one of the prevailing norms. Yet, the norm is so well entrenched in organizational cultures that orders are regularly carried out by subordinates with little regard for potential deleterious *ethical consequences* of such acts." (emphasis added)); Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective to Voluntary Deference to Authorities*, 1 Personality & Soc. Psychol. 323, 323 (1997) ("In fact,

as the Milgram studies on obedience to authority suggested, people often defer to authorities even when the actions they must undertake to do so are extremely personally aversive.").

Fourth, it is instructive to review Chief Justice Castille's position that the role of the other six Justices cured his ethical violations in light of the ethical rules concerning lawyer conflicts of interest adopted by the Pennsylvania Supreme Court. Like almost every state supreme court, Pennsylvania has adopted the full imputation principle enshrined in Rule 1.10 of the Model Rules. Pa. Rules of Prof'l Conduct R. 1.10. This provision mandates that all lawyers in the same law firm are subject to each other's conflicts of interest, and all are equally barred from taking on an engagement that creates a conflict for any one lawyer in the firm. *Id.* It does not matter whether the lawyer is three thousand miles away, is in a different department of the firm, has never met the lawyer with the actual conflict, or

knows nothing about the matter or the client creating the conflict.[6]

The principles behind this rule contrast sharply with Chief Justice Castille's view that his conflict was not imputed to his colleagues and, moreover, that he was permitted to participate fully in every aspect of the adjudication. While *amici* applaud the steps the Pennsylvania Supreme Court took to protect clients from lawyers with conflicts of interest, it is the view of *amici* that, if anything, the need to protect litigants from judges with conflicts of interest is even more important. Consequently, if Chief Justice Castille's participation in this case is left standing, it will be anything but the correct result.

One could argue that many of the aforementioned threats to impartiality would persist, creating a biased panel, even if the Chief Justice had recused himself. Even if the Chief Justice were screened off from the case, he might

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[6] Equally instructive is the Pennsylvania Supreme Court's adoption of a narrow cure for one specialized type of conflict of interest that permits the lifting of imputation. Pennsylvania's conflict imputation rule stipulates that when a lawyer joins a new law firm, the conflicts he or she brings to the new law firm will not be imputed to others in the firm so long as the new lawyer is immediately and fully screened from participation in any matter in which he or she would be conflicted, and so long as elaborate protocols are instantly instituted to assure that the screen is not breached. Pa. Rules of Prof'l Conduct R. 1.10. Contrast that with Justice Castille's opposing approach of bringing his breach of Rule 2.11 to the Court's adjudicative process by ostentatiously taking a full seat at the oral argument, the deliberation table, and the drafting and production process of the opinion.

still be able to exercise his administrative powers and intangible influence on the panel in other ways. Furthermore, the other Justices, knowing Chief Justice Castille's connection to the District Attorney's Office, might still harbor some concern about criticizing the prosecutor's misconduct.

It would be inconceivable, however, to require an entire court of last resort to recuse itself. Instead, Justices may sit, even if conflicted, in situations where their presence is *absolutely* necessary. *See United States v. Will*, 449 U.S. 200, 213 (1980) (reaffirming the "ancient" Rule of Necessity that a judge must sit in a case, even if "he has [a] personal interest" where the case could not be heard otherwise) (emphasis added). This does not, however, excuse the behavior of Chief Justice Castille or affect the remedy in this case because the Chief Justice's presence was simply not necessary. The Code may have to tolerate some conflicts, but it does not tolerate impropriety that can easily be avoided. Furthermore, because Chief Justice Castille is now retired, and new Justices have joined the Pennsylvania Supreme Court, there will be no such problem on remand.

For the foregoing reasons, a multimember tribunal cannot cure the profound conflicts of one member. Instead, it provides an incubator for one member to spread impermissible and unethical biases, either through implicit or explicit advocacy within the deliberation process or through the creation of an environment where colleagues are affected by considerations extraneous to the

objective merits of the case. Furthermore, Chief Justice Castille's actual and symbolic authority as Chief Justice further intensify his potential to taint the entire panel because of the power and influence he may possess within the Court. As such, it is clear that Chief Justice Castille's participation in this case eviscerated the very concept of impartiality. He should not have been permitted to affect his colleagues in a way that assaults the principle of even-handed justice and violates the Due Process rights guaranteed to every individual by the United States Constitution.

Conclusion

Chief Justice Castille had both a constitutional and ethical obligation to recuse himself in this case. His prior involvement as District Attorney ensured that he was incapable of providing the most basic Due Process right to a fair tribunal to Mr. Williams. Moreover, his clear disregard for numerous sections of the Code that required his recusal left an indelible stain on the Pennsylvania judicial system. To make matters worse, Chief Judge Castille threatened the impartiality of each and every one of his colleagues on the Pennsylvania Supreme Court by hampering their ability to decide the case based solely on an impartial consideration of the evidence presented. Such a blatant disregard of both constitutional protections and ethical obligations simply cannot be tolerated because of the damage it does to individuals like Mr. Williams and to the broader community's need for confidence in the independence, impartiality, and fairness of the

judiciary. If Chief Justice Castille's conduct is not unconstitutional impropriety itself, *amici* do not know what is.

Respectfully submitted,

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Appendix A

IDENTITY OF *AMICI CURIAE*[1]

The **Louis Stein Center for Law and Ethics**[2] is based at Fordham University School of Law and sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law School faculty have examined the ethical dimensions of the administration of criminal justice, including issues of judicial ethics.

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[1] The affiliations of the various *amici* are for identification purposes only and the views expressed in this brief are not necessarily the vies of those institutions and firms.

[2] The views expressed herein are not necessarily those of Fordham University or Fordham Law School.

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